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IN THE

Supreme Court of the United States

KOYO SEIKO CO., LTD.
AND KOYO CORPORATION OF U.S.A.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

In the decision below, the Federal Circuit incorrectly deferred to an agency interpretation of the Tariff Act of 1930 that squarely conflicts with the Nation's treaty obligations. As the *amicus* filing by the Government of Japan confirms, that conflict alone justifies this Court's review. In addition, the lower court's failure to recognize that the *Charming Betsy* canon afforded the agency discretion to avoid that conflict—and rendered the agency's treaty-violating interpretation of a concededly ambiguous statute unreasonable under *Chevron*—conflicts with the decisions of other circuits and increases the likelihood that other laws will be construed in a manner that violates the Nation's international legal obligations.

Unable to refute this showing, respondents seek instead to obscure and mislead. They argue that there is no conflict between the practice of "zeroing" and U.S. treaty obligations because the Department of Commerce (the "Department") applied zeroing in an administrative review, rather than in a dumping investigation. This is the classic distinction without a difference: The Tariff Act requires a "fair comparison" in both investigations and reviews; zeroing inflates and, in some cases, creates dumping liability in the same manner in both types of proceedings; and the relevant treaty provision applies to both types of proceedings, as the Appellate Body of the World Trade Organization ("WTO") has made clear.

The United States also argues that the *Charming Betsy* canon does not apply to the treaty obligations at issue in this case, and that the statute precludes reliance on this canon in judicial proceedings. The first of these claims is flatly contradicted by concessions the United States has made in WTO proceedings. The second claim is wrong as a matter of law, as both courts below expressly held.

Finally, the doctrinal conflict the decision below creates is real and important. In arguing otherwise, respondents simply mischaracterize the conflict identified in the petition between

the decision below and the decision of other courts of appeals regarding the application of the *Charming Betsy* canon.

1. Tacitly recognizing that an agency should not interpret an ambiguous statute in a manner that places the Nation in violation of its treaty obligations, the United States struggles in vain to show that the practice of zeroing does not conflict with the WTO Anti-Dumping Agreement ("AD Agreement").[1] The United States claims that differences between anti-dumping investigations and administrative reviews are so "significant" that, even though the Appellate Body has repeatedly condemned zeroing in investigations, this practice "may be permissible in the context of an administrative review." U.S. Opp. 14-15. This claim is baseless.

The only difference the United States identifies between the two types of proceedings, *id.* at 15, is that, in an investigation, the Department compares "the weighted average of the normal values to the weighted average of the export prices (and constructed export prices)," 19 U.S.C. § 1677f-1(d)(1)(A), whereas, in an administrative review, it compares the weighted average of the normal values to the "export prices (or constructed export prices) of individual transactions." *Id.* § 1677f-1(d)(2). As the title of this statutory subsection makes clear, however, both comparisons are made for the same purpose: to determine whether merchandise is being sold at "less than fair value." *Id.* § 1677f-1(d). Whenever the Department determines "whether subject merchandise is being, or is likely to be, sold at less than fair value," the Tariff Act requires the Department to do so based on a "fair comparison . . . between the export price or constructed export price and normal value," *id.* § 1677b(a)[2]—the very

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[1] *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade*, Apr. 15, 1944, Marrakesh Agreement Establishing the WTO, Annex 1A (1994)

[2] Section 1677b(a) requires a "fair comparison" for all determinations of "less than fair value" sales that are made "under this subtitle." 19

same comparison that Article 2.4 of the AD Agreement requires. See Pet. 5-6 (explaining how § 1677b(a) was modeled on, and implements, Article 2.4 AD Agreement). Thus, the methodologies prescribed for investigations and administrative reviews are simply two ways of determining the same concept—whether merchandise is sold at less than fair value—and Congress has mandated that, whenever the Department makes this determination—whether in investigations or administrative reviews—it must use the "fair comparison" that the AD Agreement requires.

Use of zeroing in administrative reviews, in turn, creates precisely the same statistical bias that the Appellate Body condemned when the practice is used in investigations. Whether the weighted average of normal values is compared to "the weighted average of the export prices," as in investigations, 19 U.S.C. § 1677f-1(d)(1)(A), or to the export prices "of individual transactions," as in administrative reviews, *id.* § 1677f-1(d)(2), both comparisons produce positive and "negative" dumping margins. The practice of zeroing is used to convert those negative margins to zero. Thus, in both investigations and administrative reviews, the practice inflates the weighted average dumping margin that would be found if the negative dumping margins were given their full mathematical effect, and can create dumping liability where none would otherwise exist. See Pet. 8 (illustrating zeroing's effect).[3]

U.S.C. § 1677b(a). Section 1677f-1(d), which governs the determination of such sales in both investigations and administrative reviews, is part of the same subtitle as § 1677b(a).

[3] The United States notes that the value of the sales that generate negative margins is included in the denominator used to calculate the weighted average dumping margin, which effectively lowers the margin compared to what it would be if the negative margin sales were excluded from both the numerator and denominator. U.S. Opp. 4 n.4. That zeroing could be performed in an even more statistically biased manner does not change the fact that this practice inflates dumping liability and can create

The AD Agreement and the Appellate Body's decisions make clear that this statistical bias is just as impermissible in administrative reviews as it is in investigations. The Appellate Body found that, when used in investigations, "'zeroing' . . . is *not* a 'fair comparison' between export price and normal value, as required by Article 2.4." Pet. App. 112a (*EC – Bed Linen*, ¶ 55). This same requirement applies to administrative reviews. These retrospective reviews are governed by Article 9.3.1 of the AD Agreement, and Article 9.3 states that the "amount of the anti-dumping duty shall not exceed the margin of dumping *as established under Article 2*." Reply App. 1a (emphasis added). Thus, the very same "fair comparison" requirement that prohibits the use of zeroing in investigations governs administrative reviews.

The Appellate Body has made clear, moreover, that zeroing's statistical bias precludes a "fair comparison" regardless of the type of anti-dumping proceeding in which it is used. In *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Steel Flat Products from Japan*,[4] the Appellate Body addressed the propriety of zeroing in "sunset" reviews, proceedings that occur every fifth year in which the Department relies on the dumping margin determinations from prior administrative reviews and initial investigations to determine whether anti-dumping orders should be continued or revoked. 19 U.S.C. § 1675(c). Because sunset reviews are also subject to Article 2.4's "fair comparison" requirement,[5] the Appellate Body cited its ruling in *EC – Bed Linen* when addressing the propriety of zeroing in such reviews. Noting that a comparison based on zeroing

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such liability where none would otherwise exist in violation of the AD Agreement.

[4] WT/DS244/AB/R (adopted Jan. 9, 2004) ("*US – Corrosion-Resistant Steel*").

[5] Sunset reviews are governed by Article 11.3 of the AD Agreement, which, like Article 9.3, incorporates the requirements of Article 2. *See* Reply App. 13a-15a (*US – Corrosion-Resistant Steel* ¶¶ 126-127, 130).

"is not a 'fair comparison' . . . as required by Articles 2.4 and 2.4.2," the Appellate Body stated that when agencies "use a zeroing methodology such as that examined in *EC – Bed Linen* to calculate a dumping margin, whether in an original investigation *or otherwise*, that methodology will tend to inflate the margins calculated." Pet. App. 102a (¶¶ 134-135) (emphasis added). Because the United States claimed that it had not used zeroing, factual inadequacies in the record prevented the Appellate Body from determining "whether the methodology that [the Department] used in calculating the dumping margins in the administrative reviews was equivalent in effect to the methodology used . . . in *EC – Bed Linen*." *Id.* at 104a (¶ 137). The Appellate Body left no doubt, however, that where, as here, zeroing or a practice of "equivalent effect" *is* used in administrative reviews, it violates Article 2.4's "fair comparison" requirement.

2. As petitioners have shown, the clear conflict between zeroing and the requirements of the AD Agreement should have been avoided through application of the *Charming Betsy* canon. The Federal Circuit's failure to apply that canon—and instead to uphold a statutory interpretation that exposes the Nation to substantial trade sanctions (Japan Br. 9, 12-13)—was a clear and significant error of law.

The United States contends that the *Charming Betsy* canon can play no role in the interpretation of ambiguous statutory language implicating U.S. compliance with the AD Agreement.[6] That canon, it contends, is designed only to avoid "unreasonable interference with the sovereign authority of other nations," U.S. Opp. 12-13 (internal quotation marks

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[6] The United States half-heartedly suggests that the lower court did not pass on the *Charming Betsy* question because of distinctions between *EC – Bed Linen* and this case. U.S. Opp. 14. But, before it mentioned those distinctions, the court rejected petitioners' *Charming Betsy* claim. *See* Pet. App. 15a (because the Department's construction "is entitled to considerable weight, we refuse to overturn the zeroing practice based on *EC – Bed Linen*") (internal quotation marks and citation omitted).

omitted), and "has no application where, as here, Congress has unambiguously specified that alleged conflicts between a domestic agency action and the Uruguay Round Agreements are to be resolved through consultation between the Executive and Legislative Branches, and not through litigation in domestic courts." *Id.* at 13-14. The United States cites no case, however, in which this Court has restricted the *Charming Betsy* canon to cases involving the sovereign authority of other nations, and it is well settled that the canon applies to all international obligations, not just those owed to other sovereigns. See *Restatement (Third) of the Foreign Relations of the United States* § 114 (1987) (ambiguous statutes should "be construed, where possible, to be consistent with international obligations of the United States"); *Ali* v. *Ashcroft*, 346 F.3d 873, 885 (9th Cir. 2003) (applying canon to U.S. obligation to aliens).

Moreover, the United States has recently acknowledged that the canon applies to the very statute at issue here. In dispute settlement proceedings before the WTO, Canada argued that § 129(c)(1) of the Uruguay Round Agreements Act ("URAA") (codified at 19 U.S.C. § 3538(c)(1)) mandated a violation of the AD Agreement because it barred the Department from retrospectively applying definitive interpretations of the AD Agreement to previously imported goods. The United States dismissed this argument, explaining that, "U.S. courts and agencies must recognize the longstanding and elementary principle of U.S. statutory construction that 'an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.'"[7] In stark contrast to its current claims, the United States nowhere suggested that the "continuation of th[is] sentence" from *Charming Betsy*, U.S.

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[7] *United States – Section 129(c)(1) of the Uruguay Round Agreements Act, Second Written Submission of the United States*, WT/DS221 ¶ 12 (Mar. 8, 2002) (quoting *Murray v. Schooner Charming Betsy*, 6 U.S. (4 Cranch) 64, 118 (1804)) (attached hereto as Reply App. 4a).

Opp. 12, rendered this "elementary principle" inapplicable to statutes implementing international trade agreements.

Similarly, while the United States now claims that § 3512(c)(1) bars all judicial challenges, "such as those raised in this case, to agency action on grounds of alleged incompatibility with the Uruguay Round Agreements," *id.* at 19, it told the WTO that § 3538(c)(1) "does not limit judicial review of the results of [Department anti-dumping proceedings], and it does not limit [the Department's] obligation to implement the results of any such judicial proceedings." Reply App. 9a (¶ 20). On the basis of this interpretation of U.S. law, the WTO rejected Canada's claim. It would have been extraordinarily disingenuous for the United States to assure the WTO that § 129(c)(1) permitted judicial review of Department anti-dumping proceedings if, as the United States now claims, other provisions of the URAA precluded that very review.

In all events, the United States' § 3512(c)(1) argument is plainly wrong, as both courts below held. Pet. App. 8a, 40a.[8] Section 3512 is designed to establish "the primacy of domestic law over any inconsistent provision of the Uruguay Round Agreements." U.S. Opp. 18. Thus, where U.S. law mandates or authorizes executive branch action, § 3512 is properly read to bar litigants from challenging that action on the ground that U.S. treaty obligations trump such a mandate or authorization. The issue in this case, however, is different. Because the statute is ambiguous, the very question is *whether* U.S. law authorizes zeroing. In answering that question, courts properly employ ordinary principles of statutory construction, including the *Charming Betsy* canon. Indeed, it is undisputed that Congress expressly incorporated Article 2.4's "fair comparison" requirement into the Tariff

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[8] Contrary to the United States' claims, U.S. Opp. 14, the Federal Circuit addressed its § 3512(c)(1) argument, ruling "that § 3512(c) does not prevent us from addressing Koyo's" claims. Pet. App. 8a.

Act. Pet. 6-7. It is absurd to suggest that, having tied the meaning of U.S. law to a treaty requirement, Congress barred courts from considering whether the administering agency's interpretation of that statute was consistent with the WTO's authoritative interpretations of the underlying treaty provision.

Respondents' reliance on URAA provisions that prescribe how the political branches will resolve treaty violations, U.S. Opp. 13-14, 19-20; Timken Opp. 5-6, 11-13, is misplaced for the same reason. These provisions apply when U.S. law mandates or authorizes action that the WTO deems violative of the treaty, not when courts determine *whether* an ambiguous statute authorizes practices inconsistent with treaty terms. The "consultation" and "implementation" provisions respondents cite thus do not disable courts from applying the *Charming Betsy* canon to resolve such questions.[9] Indeed, such a reading of these provisions of the statute would lead to unnecessary friction between the United States and other nations, and would compel the political branches to resolve conflicts with WTO rulings that Congress never intended to authorize in the first place.

In short, by failing to apply the *Charming Betsy* canon, the lower court has blessed an administrative interpretation that creates an unnecessary conflict with the AD Agreement. That failure, which undermines the Nation's "role as a trusted partner in multilateral endeavors," *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 539

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[9] Nor do they immunize an erroneous decision from review where, as here, goods are imported before the Appellate Body condemns a practice. Timken Opp. 8-9. This claim is based on § 129(c)(1), 19 U.S.C. § 3538(c)(1), which comes into play when (a) U.S. law authorizes action, (b) the WTO deems that action violative of the AD Agreement, and (c) the United States decides to comply with the WTO's ruling. That a compliance decision (step c) has only prospective effect is irrelevant to whether the Federal Circuit erroneously upheld the Department's misinterpretation of U.S. law (step a).

(1995), and exposes the Nation to retaliatory sanctions by its trading partners, plainly warrants this Court's review.

3. The need for such review is underscored by the doctrinal conflict in the lower courts over the proper role of the *Charming Betsy* canon when courts review the increasing number of administrative interpretations of federal laws that implicate the Nation's international legal obligations. Respondents' facile distinctions of the cases petitioners have cited do not undermine this additional basis for review.

The United States argues that in the decision below and in *George E. Warren Corp.* v. *U.S. EPA*, 159 F.3d 616 (D.C. Cir. 1998), *amended on other grounds by* 164 F.3d 676 (D.C. Cir. 1999), both courts upheld the agency interpretations at issue. U.S. Opp. 21. This happenstance, however, cannot obscure the fundamental conflict in the courts' respective approaches to the *Charming Betsy* canon. The Federal Circuit has concluded that a statute's exhaustive specification of factors an agency is to consider effectively overrides the canon and deprives an agency of discretion to interpret U.S. law in a manner that does not violate U.S. treaty obligations. Pet. App. 13a-14a. The D.C. Circuit applied the canon in precisely the opposite manner. Citing *Charming Betsy* and the obligation to avoid a "conflict with a treaty obligation," the D.C. Circuit held that an agency enjoyed discretion to construe domestic law to avoid a conflict with an Appellate Body ruling, even though the statute's exhaustive specification of the factors the agency was to consider did not include consideration of U.S. treaty obligations. *George E. Warren Corp.*, 159 F.3d at 623-24.[10] The Federal Circuit's contrary approach increases the likelihood of conflicts between U.S. law and U.S. treaty obligations, which is what the *Charming Betsy* canon is intended to avoid.

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[10] Timken's claim that the *Charming Betsy* canon "played no role in [*Warren*'s] Chevron analysis," Timken Opp. 17-18, is thus flatly wrong.

Similarly, the United States dismisses the conflict between the decision below and *Ali* v. *Ashcroft*, 346 F.3d 873 (9th Cir. 2003), because, in the latter case, the Ninth Circuit found that the agency's interpretation of an ambiguous statute was inconsistent with its own regulations. U.S. Opp. 20-21. Although this inconsistency deprived the agency's interpretation of full *Chevron* deference, *Ali*, 346 F.3d at 885, the Ninth Circuit did not rule that the inconsistency rendered the agency's interpretation impermissible. In addressing this ultimate question, the Ninth Circuit reasoned that, because the agency's interpretation would lead to a violation of U.S. international obligations, it was inconsistent with Congress's presumed intent that U.S. law conform to such obligations. *Id.* at 885-86. In stark contrast, the Federal Circuit never considered how this presumption (embodied in the *Charming Betsy* canon) affects the reasonableness of an administrative interpretation. Instead, it ruled that the Appellate Body's decision in *EC – Bed Linen* was not sufficiently "persuasive" to render a "longstanding" agency interpretation unreasonable. Pet. App. 14a.[11]

The conflict between the Federal Circuit's approach and that of a sister circuit is fundamental. And, moreover, the Federal Circuit's approach increases the likelihood that U.S. law will be construed in a manner that gives rise to unintended violations of U.S. international legal obligations. This conflict further underscores the need for review of the decision below.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

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[11] In fact, the lower court's reliance on the "longstanding" use of zeroing is misplaced. Congress incorporated the "fair comparison" requirement into Tariff Act in 1994, after the Department adopted zeroing. Continued adherence to a practice after Congress changes the law and ties its meaning to that of a treaty is not a basis for *Chevron* deference.

Respectfully submitted,

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